An old adage about the difference between Oxford and Cambridge goes: 'In Oxford, they say, "That might be true but is it is interesting? But in Cambridge they say, "That might be interesting, but is it true?"' Recently retired UK Supreme Court judge Jonathan Sumption's short book, *The Trials of the State: Law and the Decline of Politics*, based on his 2019 Reith Lectures for the BBC, is certainly interesting. It contains, for example, Sumption's commentary on a number of leading Supreme Court cases (*Unison*, *Evans*, *Miller* no. 1 and *Nicklinson* among others, although not *Privacy International*, which was being decided as the lectures were being prepared) in the course of which he sets out his disagreements with some of the views of his former colleagues on the Court, especially those of Lady Hale, whose response, 'Law and Politics: A Reply to Reith' can be found on the Supreme Court's website. The question, however, is whether Sumption's claims are true.

Sumption's thesis concerns not so much the detail of Supreme Court judgments as the state of the British politics and society and their relationship to the law. His view is that, largely as a result of mass democracy, the law is now more important in daily life than ever before and that, concomitantly, 'the amount of state power available for this purpose is very great'. At the same time, the political institutions that wield state power have lost legitimacy, which he claims is illustrated by a collapse in participation in politics. He observes that some lawyers think that a way to restore legitimacy would be through the law, in particular, by adopting a 'written' constitution (more precisely, a codified and legally enforceable constitution), but Sumption thinks that would be a mistake. The growth of law's importance, he claims, is a bad idea, undermining personal responsibility and autonomy, and a legally enforceable codified constitution would take us further down the path of turning law into 'politics by other means'. It would not even, Sumption says, provide any extra practical protection for minorities from the tyranny of the majority: 'Experience suggests that judges charged with making essentially political decisions are no more likely than politicians to make enlightened ones'. Judicial appeals to the 'rule of law' amount, in Sumption's view, to offering special protection to substantive liberal values no more worthy of that protection than other political ideologies such as 'communism, fascism, monarchism, Catholicism, Islamism and all the other great -isms that have historically claimed a monopoly of legitimate political discourse'. We should look for salvation not to judges but to political reform, for example changing the voting system.

The thesis is interesting. Its problem is that its factual basis is not as obvious as Sumption thinks. This is especially true of the first part of the book in which he bemoans 'Law's Expanding Empire'. Certainly, the amount of statute law and secondary legislation has risen enormously over the past 100 years, but has this rise inconvenienced the everyday life of ordinary citizens? Sumption relies on a rise in the number of solicitors in England and Wales from around one for every 3000 inhabitants in 1911 to one for every 400 a century later. But solicitors mainly work on business transactions and smoothing businesses' relationships with regulators. Most people have no interactions with a solicitor from one year, or even one decade, to another. In addition, Sumption fails to point out that the parallel ratio for barristers, at around one for every 3500 inhabitants, has remained constant over the same period. Something interesting has happened, presumably a massive increase in transactional work unaccompanied by any parallel increase in contentious work, but whatever it is, it is not captured by a crude assertion about the increase in the influence of law on everyday life.

Also in this part of the book, Sumption claims that before the 19th century,

> 'The law dealt with a very narrow range of human problems. It regulated title to property. It enforced contracts. It protected people's lives, their persons, their liberty and their property against arbitrary injury'.

Sumption was trained as a historian rather than as a lawyer and one hesitates to criticise him on a historical point, but, as the work of historians such as Douglas Hay and Nicholas Rogers has suggested, the law protected some people by regulating others. For example, servants, but not their

masters, were subject to criminal penalties for offences such as disobedience and failing to finish their work and the ever-expanding vagrancy laws subjected the poor to imprisonment or corporal punishment. Moreover, before the Married Women's Property Act 1882, regulating 'title to property' included keeping women in a state of semi-serfdom. The law might not have interfered much in the lives of men of Sumption's status and income, but it had considerable effects on everyone else, effects that democracy has arguably reduced, not increased.

The factual basis of the second chapter, 'In Praise of Politics', is stronger. To illustrate his claim that British political institutions have lost legitimacy, Sumption points out, accurately enough, that large numbers of British survey respondents recently said that they would like to see installed in power a 'strong leader willing to break the rules', and that faith in members of Parliament is low. He also draws attention to the divisions, 'generational, social, economic, educational and regional', created by the Brexit referendum and to the totalitarian language, 'enemies', 'traitors', 'saboteurs' it has generated, largely because of the habit of treating the majority as if it were the whole of 'the British people'. But Sumption is wrong to say that participation in politics is falling. Turnouts in British general elections rose from 2001 to 2017 and fell only slightly in the election held in the darkness and cold of December 2019. Membership of most of the largest political parties also rose sharply in that period, admittedly not back to the levels of the 1950s but far higher than the 1990s. The problem is not lack of participation in the institutions of representative democracy but lack of ideological commitment to them. Many of those who voted for Brexit believe that the referendum constitutes a new fixed point in political history, an unchallengeable and irreversible manifestation of the 'will of the people', a revolutionary doctrine that erases the dissenting minority from political consciousness and delegitimises any institution that appears to defy 'the people' (including parliament, the civil service and the judiciary). The issue for the future is whether these institutions can recover, and if not, what will be the consequences of treating the 2016 referendum as a foundational constitutional moment?

Sumption deals with the role of the law in two chapters, one devoted to human rights and the other entitled 'Lessons from America'. Neither is particularly original: the former sets out the conventional case against the European Convention on Human Rights as undemocratic and that against the European Court of Human Rights as an activist court; the latter makes the standard case against the US Supreme Court that it is a political court making anti-democratic political decisions. The factual sins in these chapters are more of omission than commission – for example Sumption fails to mention that the European Convention has been amended 16 times and that the specialist constitutional courts of France and Germany are appointed in very specific ways designed to give them a degree of democratic legitimacy. More generally, a broader comparative chapter, covering the major European countries and the EU, would have been more enlightening than one concentrating almost entirely on the United States, whose constitution is now rarely emulated. Perhaps Sumption was influenced by the BBC, which even during the Brexit crisis appears to have kept twice as many correspondents in Washington DC than in Brussels.

One of Sumption's claims in these chapters, however, needs serious qualification, namely that no factual basis exists for the idea that constitutional judges protect minorities from oppression. Sumption attempts to insulate his claim by trying, rather oddly, to exclude from consideration cases of 'classic discrimination', a move that arbitrarily dismisses without discussion vast numbers of possible counter-examples. He also claims that no legal criteria exist by which a court can judge what counts as oppressive, thus airily ignoring not only the efforts of constitutional lawyers to develop such criteria, not least the celebrated footnote 4 of the opinion of the US Supreme Court in *US v Carolene Products* 304 U.S. 144 (1938) (offering legal protection for 'discrete and insular' minorities who cannot protect themselves politically), no mention of which appears in the 'America' chapter,

but also the efforts of private lawyers over many centuries to distinguish conscionable from unconscionable bargains.

Despite these factual problems, could Sumption nevertheless be basically right about the political nature of much constitutional adjudication? His thesis rests on his conceptual and normative claims about the 'rule of law'. Sumption's assertion is that 'the rule of law' should mean only three things:

> First, public authorities have no power to coerce us, other than what the law gives them. Second, people must have a minimum of basic legal rights. One can argue about what those rights should be. But they must at least include protection from physical violence and from arbitrary interference with life, liberty and property. Without these, social existence is no more than an exercise of raw power. Third, there must be access to independent judges to vindicate these rights, administer the criminal law and enforce the limits of state power.

But, he asserts, his fellow judges have expanded its meaning so that it 'penetrates well beyond [the courts'] traditional role of deciding legal disputes and into the realms of legislative and ministerial policy.' They have done so by adopting the 'principle of legality', which Sumption re-dubs the 'principle of legitimacy', which he interprets as a judicial presumption against types of action considered 'inherently illegitimate', for example 'retrospective legislation, oppression of individuals, obstructing access to a court, [and] acts contrary to international law'. The courts refuse to co-operate with these types of action unless the government and parliament call for them so clearly that they have fully taken responsibility for them. Sumption claims that the principle of legality operates without clear principle and reflects nothing except the judges' own political prejudices. As such, he claims, they constitute a liberal political programme no more deserving of protection from democratic rejection than the other ideologies he lists. This is a serious, and controversial claim. Is it right? Is the expanded concept of legality itself an aspect of partisan liberal politics?

One difficulty for Sumption's position is that the historical and common law sources of these allegedly partisan liberal values predate liberalism. The presumption against retrospectivity, for example, goes back to the Corpus Juris Civilis and thence to Bracton and Coke (see Ben Juratowitch *Retroactivity and the common law* (2008) at 28-29). Is Sumption really claiming that Trebonian was a 'liberal'? One could also point to the jurisprudential discussions of these values. Are we to understand Lon Fuller to be a 21st century social justice warrior? Or we could look to international law, including the UN Declaration of Human Rights, against which even Stalin failed to vote. Undoubtedly people exist who approve of retrospectivity, oppression, denying justice and committing acts prohibited by international law, but to call everyone who opposes them 'liberal' is over-broad.

Perhaps more seriously, Sumption's own argument about legitimacy applies with even more force to an oppressive state. An oppressive state cannot show that it has the consent of the population it rules. Although it might in fact have the support of those who prefer order to liberty (Sumption goes so far as to mention Hobbes with approval), if oppression and injustice are prevalent no one can tell whether apparent consent is real consent. In other words, lack of oppression is a condition for legitimacy. One might debate the extent to which courts can in reality prevent oppression, and the point on the scale of oppressive state behaviour at which they should step in, but to expect them not to care about oppression is to expect them not to care about legitimacy itself.

On the other hand, turning to Sumption's final chapter ('Constitutions, New and Old'), although he might have mis-specified the legitimacy crisis Britain faces and made doubtful claims about the limits of the law, he could still be right that adopting a new constitution is not necessarily a solution to problems of legitimacy. Much depends on the process by which a new constitution is adopted. It is necessarily a political process, which can have unintended effects. Those who call for a new British

constitution run the risk, for example, that they will get a constitution inspired by a desire to implement ‘the will of the people’ and by a preference for ‘strong leaders who break the rules’. Proponents of constitutional reform might do better to start with specific problems in need of specific solutions, such as the relationship between the constituent parts of the United Kingdom.